



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Federal Trade Commission Launches Proceeding on Endorsements in Advertising

We write today to let you know about a proceeding of which broadcasters should be aware initiated not by the FCC, but, rather, by the FTC—the Federal Trade Commission. The FTC in its proceeding is revisiting and potentially modifying its [Guides Concerning the Use of Endorsements and Testimonials in Advertising](#), commonly referred to as the “Endorsement Guides.” The Endorsement Guides are intended to be a tool to assist businesses with bringing their advertising practices in line with relevant law, namely Section 5 of the FTC Act, which generally prohibits unfair or deceptive advertising.

Roughly ten years have passed since the last significant update to the Endorsement Guides; the Endorsement Guides were updated in 2009 to incorporate, among other things, guidance related to (at that time) “new” social media platforms. In light of potentially relevant changes in the marketplace and technology since 2009, the FTC now seeks public comment in its periodic, “systematic” review of the Endorsement Guides.

While the FCC is the federal agency with primary regulatory oversight of broadcasters, the FTC's Endorsement Guides apply to broadcasters just as they do to other businesses, as we discuss in greater detail below.

Background. Although the Endorsement Guides are “advisory” in nature and are not laws *per se*, the FTC has the authority under Section 5 to take action if it determines any endorsement or testimonial is inconsistent with the Endorsement Guides. All businesses that incorporate endorsements or testimonials into their advertising and promotions are well advised to understand and follow the advisory material contained in the Endorsement Guides.

The Endorsement Guides define endorsements and testimonials broadly to mean *any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser*. These may include, for example, positive mentions of products or services. A summary of important principles of the Endorsement Guides are as follows:

- *Material Connections/Disclosure.* When there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be disclosed in a clear and conspicuous manner. The concept of “material connection” is a point of focus with the Endorsement Guides. A material connection may be money in exchange for a favorable mention, but it does not have to involve a direct payment of cash; a material connection could also be a family or other personal relationship, a free or discounted product or service, or other similar items.
 - *Honest Opinions.* Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. For example, an endorser may not discuss her or his experience with a product if she or he has not tried it.
 - *Relationship to Substantiation.* Endorsements may not contain any representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. In other words, an endorser may not make a claim about a product that would require proof the advertiser does not have and would not be permitted to make directly.
 - *Consumer Endorsements.* An advertisement that uses a consumer endorsement on a central or key attribute of a product will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve. If an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement should contain a clear and conspicuous disclosure. Advertisements presenting endorsements by what are represented to be actual consumers should utilize actual consumers, or clearly and conspicuously disclose that the persons are not actual consumers.
 - *Expert Endorsements.* An expert endorser's qualifications must, in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement. Moreover, an expert endorsement must be supported by an actual

exercise of expertise, and the expert’s evaluation of the product must have been at least as extensive as the evaluation that someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented.

- *Organizational Endorsements.* An organization’s endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization.

Additional detail on these requirements and illustrative examples are found in the [Endorsement Guides](#).

As mentioned, the Endorsement Guides apply to all businesses, including broadcast stations. Broadcasters may find themselves needing to consider the Endorsement Guides (and maintain compliance with them), in any number of ways. For example, on-air talent, as “celebrities” in their local communities, may be sought after as endorsers for local businesses. If station talent provides an endorsement on social media or on the air and there is any “material connection” between the talent/endorser and the business (i.e., a connection that might materially affect the weight or credibility of the endorsement), the Endorsement Guides require a clear and conspicuous disclosure. Significantly, the FCC’s sponsorship identification rule would also be triggered if any money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by the station or on-air talent for the endorsement—in which case, an FCC rule-compliant sponsorship identification would also be required (in addition to the FTC’s “material connection” disclosure).

To the extent broadcasters’ payola and plugola policies and practices do not already address endorsements and testimonials, broadcasters may wish to incorporate the concepts of the Endorsement Guides into their policies and practices.

FTC Proceeding. In the open proceeding, the FTC seeks comment from the public on a broad array of issues, including the continuing need for the Endorsement Guides, generally, and certain provisions of them, specifically. Among the matters the FTC is evaluating with respect to social media and other online platforms are the following:

- How effectively advertisers and endorsers are currently disclosing unexpected “material connections” on social media platforms;
- Whether there is any evidence to support the argument that consumers who use social media understand that influencers who promote products are generally doing so only because they are paid or given something by the marketer, regardless of what disclosures (if any) appear in social media posts (this [FAQ](#) explains that the FTC’s current view is that some, but not all, consumers may understand this, so a disclosure is required when there is a material connection);
- Whether the Endorsement Guides should address affiliate links by endorsers (i.e., the practice whereby product reviewers provide links that can be used to purchase the products being endorsed); and

- What disclosures, if any, do advertisers or the operators of review websites/platforms need to make about the creation, collection, processing, or publication of reviews or ratings in order to prevent those reviews or ratings from being deceptive or unfair.

As of this writing, comments in the proceeding are due June 22, 2020. We will continue monitoring this proceeding and provide an update of significant developments. With respect to timing, please note the October 2009 update to the Endorsement Guides started with a request for public comment in January 2007, so this proceeding is just starting and may likewise be a multi-year process.

Newsgathering During COVID-19: HIPAA Restrictions on Media Access to Protected Health Information

We also write to let you know about recent [guidance](#) from the federal government related to required authorization prior to accessing and shooting video of patients in health care facilities—which guidance may be particularly relevant for stations as they report on various aspects of the COVID-19 pandemic. The Office of Civil Rights (OCR) at the U.S. Department of Health and Human Services, the federal agency primarily responsible for enforcement of the Health Insurance Portability and Accountability Act or “HIPAA,” recently issued guidance clarifying that even during the COVID-19 pandemic HIPAA requires covered health care providers to obtain each patient’s authorization *before* news crews may be given access to facilities where the patient’s protected health information is accessible in any form (oral, visual, etc.). Masking, obscuring, or pixelating a patient’s face or other identifying information before broadcasting a recording of the patient is not sufficient to comply with HIPAA—a valid HIPAA authorization is still required *before* giving the media such access to protected health information.

The OCR guidance states that patients receiving treatment are usually “surrounded” by HIPAA-regulated protected health information, including their names, medical record numbers, notes about their care, real-time displays of heart or lung function, etc. The guidance expressly states, “a patient’s presence in an area of a health care facility that is dedicated to the treatment of a specific disease or condition, such as COVID-19, reveals the patient’s diagnosis.” Such access to a patient’s diagnosis is not permitted under HIPAA without prior authorization from the patient.

To be clear, broadcasters generally are not responsible for obtaining any patient’s prior authorization for HIPAA purposes. The guidance is directed at covered health care providers, such as hospitals, who have primary responsibility for ensuring compliance with HIPAA (as do other “covered entities” and “business associates”). However, news media should be aware of the requirements prior to entering facilities and shooting video of any health care patients, including while covering the COVID-19 pandemic.

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